FILE COPY

Nos. 269 and 652 of October Term, 1905.

IN THE

Supreme Court of the United States.

Supreme Court U. S.
FILED
MAY 4 1906
JAMES H. MCKENNEY,
Clerk.

THE UNITED STATES,

Appellant,

vs.

AMERICAN SUGAR REFINING COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.
[FILE NO. 19,770.]

FRANKLIN SUGAR REFINING COMPANY,

Appellant,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF FOR SUGAR REFINING COMPANIES.

JOHN E. PARSONS,
JOHN G. JOHNSON,
H. B. CLOSSON,
For Sugar Refining Companies.

BYRNES POST JOB PRINTING OFFICE, NEW YORK.

34

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 269.

THE UNITED STATES,
Appellant,

AGAINST

AMERICAN SUGAR REFINING COMPANY OF NEW YORK.

October Term, 1905.

No. 652.

FRANKLIN SUGAR REFINING COMPANY,
Appellant,

AGAINST

THE UNITED STATES.

SUPPLEMENTAL BRIEF FOR IMPORTERS.

I.

Congress enacted in the very words of the Treaty itself that its term should begin "on the tenth day after exchange of ratifications of such Convention,"

to wit, on April 10, 1903. The Government attempts to meet this difficulty by informing the Court that this action of Congress was either ignorant or inadvertent, or both; and by urging the Court with its better information and more careful judgment to strike out this language from the Act.

With great respect we submit that it is altogether improper for the Executive Department to stigmatize any act of another Department as ignorant or inadvertent, whether the comment be made to the Judicial Department upon an act of the Legislative Department or to the Legislative Department upon an act of the Judicial Department.

In the present case the criticism is as unfounded as it is improper. Congress was not in December, 1903, when it passed this act in the least ignorant of the fact that on the 31st of the previous March the exchange of ratifications of the treaty had taken place in Washington at the office of the Secretary of State. On the day following, the fact had been published in the newspapers to the world; and had thereupon become a part of the public history not only of the country, but of the particular treaty itself under consideration by Congress.

Nor was it at all by any inadvertence that this provision found its way into the Act of Congress. On the contrary, for reasons as good and sufficient as they were well known, it was deliberately and carefully copied into the act from the treaty itself, and the reason was that it was in the treaty and Congress was perfectly aware that it, like every other provision of the treaty, must be accepted or the whole treaty lost. The bill was passed in the House under a special rule reported by the Committee of Rules through Mr. Dalzell. Speaking for the Committee, Mr. Dalzell explained to the House that "the effect of the rule would be to cut off amendment," and in the debate justified this in the following language:

"Now, what outrage is there in refusing amendments to this bill? What is this bill? It is not

independent legislation. This is a bill to carry out a convention heretofore entered into by the President and the Senate with the Republic of Cuba. It is a bill to carry out a national pledge, to stand by the national honor, *and you, gentlemen, know that we must take that treaty as it is made or we must leave it.* An amendment to this bill would necessitate a new convention between the Republic of Cuba and the United States. * * *.

This is a bill to carry into effect *the provisions of a treaty already made*" (Congressional Record, November 16, 1903, pp. 115, 117).

II.

The Government further argues that because the President of Cuba complied with the injunction of the President of the United States that "the date when the convention shall go into effect in Cuba" should be the same as that fixed by the President for the United States (to wit, December 27, 1903), this Court should disregard the plain language of the treaty itself and of the act of our own Congress, and uphold instead the proclamations of the executives of the two countries.

The very question presented to this Court is, whether the interpretation put upon the treaty and the act by the President of the United States is or is not correct. If it be incorrect, it is difficult to see how it can be made correct by the fact that the President of Cuba at the behest of the President of the United States committed the same error. Neither in Cuba nor in the United States do proclamations of presidents make the law. If it be material for this Court to inquire what, since April 10, 1903, has been the law in Cuba with regard to the rates of duty to be imposed upon the merchandise mentioned in the treaty imported from the United States, it is, no doubt, in Cuba, as here, to the language of the treaty itself and the statute

passed under it and the decisions of the courts construing both, that the inquiry must be directed.

The inquiry is not, however, in the least material. If the treaty and the act of Congress secured to the Cuban consignors the right to sue on the basis of the right and to these importers the right to bring in these sugars at eighty per cent. of the regular rates, they cannot be deprived of the right because the Cuban Government may have taken a different view of its obligations to its citizens under the treaty, and exacted of them upon their importations into Cuba duties at a rate made illegal by the treaty. If so, presumably the courts of Cuba will afford to its citizens the needed redress. If they do not, it must be the citizens of Cuba and not those of the United States who shall suffer thereby.

III.

Criticism is now made by the Government upon the language of the New York protest. No such point was made in the Circuit Court on or before the Board of Appraisers; and the protest is beyond doubt sufficient. It advised the Collector and the Board of Appraisers, and both understood, that the importer claimed the benefit of the twenty per cent. reduction accorded by the treaty. Nothing more was required.

United States v. *Salambier*, 170 U. S., 621:

By the Court: "It does not appear that the Collector deemed the protest insufficient in form or unintelligible. Not complaining of any want of distinctness in the protest, he adhered to his decision as to the nature of the merchandise and the amount of duty, and, in pursuance of the statute, transmitted the protest, with the invoice and entry, to the Board of General Appraisers. The Board regarded the protest as sufficient in respect to form and distinctness. * * *

The object of the statute in requiring a protest was to distinctly inform the Collector of the position of the importer. In this instance it was impossible for the Collector to have read the protest without perceiving that his classification of the merchandise as dutiable under paragraph 239 of the Tariff Act at fifty per cent. ad valorem, was objected to; and that the importer claimed that under the law the goods were dutiable at two cents per pound."

Shaw v. *United States*, 122 Fed. Rep., 443:

(Circuit Court of Appeals, Second Circuit.)

By the Court: "If the importer had said, 'I claim that the said goods are free as tapioca,' it would have been sufficient under the rule laid down in United States *v.* Salambier, 170 U. S., 621. It is true that in the present case this was not done in terms, but the necessary consequence of the notice was to inform the Collector of the precise character of the importer's claim."

Respectfully submitted,

JOHN E. PARSONS,
JOHN G. JOHNSON,
H. B. CLOSSON,
For Importers.

FILE COPY.

In the Supreme Court of the United States.

October Term, 1905.

Office Supreme Court U.
FILED
APR 26 1906
JAMES H. MCKENNEY,

THE UNITED STATES,

Appellant,

against

AMERICAN SUGAR REFINING CO.,

Appellee.

No. 269.

BRIEF FILED BY HATCH & CLUTE FOR IMPORTERS HAVING INTERESTS SIMILAR TO THOSE OF APPELLEE.

EDWARD S. HATCH,
J. STUART TOMPKINS,
Counsel for M. J Dalton & Co.

APPEAL PRINTING COMPANY, 14-16 VESEY ST., NEW YORK

35

In the Supreme Court of the United States,

OCTOBER TERM, 1905.

THE UNITED STATES,
Appellant,

against

AMERICAN SUGAR REFINING CO.,
Appellee.

No. 269.

Brief Filed by Hatch & Clute for Importers Having Interests Similar to Those of Appellee.

The importers whom we represent, M. J. Dalton & Co., have pending in the Circuit Court of the United States for the Eastern District of Pennsylvania, two suits involving importations of cigars from Cuba. In one of those suits the United States is appellant, in the other the importers are the appellants.

The issue involved in these suits is practically the same as the question now before this Court in the cases of the American Sugar Refining Co. vs.

United States and The Franklin Sugar Refining Co. vs. United States.

The merchandise covered by the Dalton cases consisted of cigars, which were manufactured in and imported from Cuba, and assessed for duty under Paragraph 217 of the Tariff Act of 1897, at the rates therein provided. The importers claimed that the cigars were subject to a twenty per cent. reduction in duty in accordance with the provisions of the treaty between the United States and Cuba proclaimed by President Roosevelt, December 17th, 1903.

Only one protest, 109712, is embraced in the appeal of the United States vs. M. J. Dalton Company, Suit No. 1720. The goods that were the subject of that protest originally arrived in New York and were sent to Philadelphia under the immediate transportation act in bond. They were entered for consumption at Philadelphia, and duties were paid on December 18, 1903, one day after the President issued his proclamation above cited, and the entry was liquidated January 19, 1904. Regarding this merchandise, the Board of General Appraisers in their decision rendered March 25th, 1905, known as *In re M. J. Dalton Company, T. D. 26214, G. A. 5989*, held that it was entitled to the twenty per cent. reduction as claimed, on the ground that the President did not have the power to postpone the operation of the treaty, until December 27th, 1903. From that ruling the Collector of Customs at Philadelphia appealed under instructions from the Treasury Department issued April 4th, 1905, known as T. D. 26231, and the appeal is known as *United States vs. M. J. Dalton Company, Suit No. 1720.*

All of the importations that are embraced in

M. J. Dalton Company vs. United States, Suit No. 1721, were made and entered for consumption at the Port of Philadelphia, subsequent to April 10th, 1903, and prior to December 17th, 1903; and as to the goods covered by those importations, the Board held that they were not subject to the twenty per cent. reduction on the ground that the Cuban Treaty did not take effect until December 17th, 1903, when it was proclaimed by the President, thus overruling the importer's claim, that it went into effect April 10th, 1903, the tenth day after ratifications were exchanged.

Article II of the convention between the United States and Cuba provides as follows:

> "During the term of this convention, all articles of merchandise not included in the foregoing Article I, and being the product of the soil or industry of the Republic of Cuba imported into the United States, shall be admitted at a reduction of twenty *per centum* of the rates of duty thereon as provided by the Tariff Act of the United States, approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

Article XI, fixing the time when the convention if approved, should go into effect, reads as follows:

> "The present convention shall be ratified by the appropriate authorities of the respective countries, and the ratifications shall be exchanged at Washington, District of Columbia, United States of America, as soon as may be before the Thirty-first day of January, 1903, and the convention shall go into effect on the tenth day after the exchange of ratifications, and shall continue in force for the term of five (5) years from date of going into ef-

> fect, and from year to year thereafter until the expiration of one year from the day when either of the contracting parties shall give notice to the other of its intention to terminate the same."

The exchange of ratifications occurred on March 31, 1903.

On March 19, 1903, the Senate of the United States adopted a resolution in these words:

> "This convention shall not take effect until the same shall have been approved by the Congress."

It did not change the terms of the treaty, merely requiring the approval of Congress before it should become binding.

On December 17, 1903, Congress gave its approval by an act entitled: "*An Act to carry into effect a convention between the United States and the Republic of Cuba, signed on the 11th day of December, in the year 1902.*" Section I of the Act of Congress provides:

> "That whenever the President of the United States shall receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the articles or the convention between the United States and the Republic of Cuba, signed on the eleventh day of December in the year nineteen hundred and two, he is hereby authorized to issue his proclamation declaring that he has received such evidence, and thereupon, on the tenth day after exchange of ratifications of such convention between the United States and the Republic of Cuba, and so long as the said convention shall remain in force, all articles of merchandise being the product of the soil or industry of the Republic of Cuba * * * and all other articles of merchandise being

the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty *per centum* of the rates of duty thereon, as provided by the Tariff Act of the United States. * * *"

ARGUMENT.

I.

The treaty should be given effect in accordance with its terms as ratified by the contracting parties and approved by the Congress.

There can be no dispute but that, under the decisions in the insular cases, so called, a treaty is to be deemed in effect, with respect to the rights of individuals, upon the exchange of ratifications by the contracting parties, unless another date is therein fixed. The question of the necessity for action by Congress to execute the commercial convention with Cuba or make it operative as a measure affecting the revenue has not been raised, as it has been assumed to be effective by virtue of the Act of Congress approving it, rather than by its ratification as a treaty, the convention itself providing that it shall not take effect until approved by the Congress.

In the construction of treaties, as of statutes, it is a well established rule that every part of the treaty or statute should, if possible, be given effect. There is no difficulty in applying the rule here, for there is no real conflict between the two provisions relating to the time of taking effect. It was to be in effect ten days after ratifications

were exchanged, as originally contemplated, subject to its being approved by the Congress, either before or after the expiration of the ten days. At the time the ratifications were exchanged it could not have been assumed that the approval of the Congress would be had within ten days, for the Congress was not then in session. It is only where two provisions of a treaty or statute are irreconcilable that it becomes necessary to apply the rule that where there are conflicting provisions the latter will control. In the addition of the Senate's amendment there is no indication of any intention to make any alteration in the terms of the convention, but only to make the taking effect ten days after the exchange of ratifications conditional upon approval by the Congress.

The view taken of the matter by the Congress must be sought for in the Act which they passed approving the treaty or making it effective. The Act is entitled "An Act to carry into effect a convention between the United States and the Republic of Cuba, signed on the 11th day of December in the year nineteen hundred and two." No attempt was made to alter the time of taking effect fixed by the terms of the convention, but on the contrary the convention in the form in which it was presented to them was accepted and approved by the Congress. And if there had been any doubt as to their understanding of the time fixed in the convention, it is dispelled by the provision incorporated in the Act. The Act authorized the president, when he should have received satisfactory evidence that Cuba had made provision to give full effect to the convention, to issue his proclamation accordingly, and it was declared that thereupon "on the tenth day after exchange

of ratifications of such convention between the United States and the Republic of Cuba, and so long as said convention shall remain in force," the reduced rates of duty should be applicable. If it could be claimed that the ten days clause in the convention had been overlooked, it could not be claimed that there was any inadvertence in the provision of the statute. The ratifications had been exchanged months before the bill was passed by the Congress, but with that fact before it the deliberate enactment of the Congress was that the reduced rates of duty should be applied commencing on the tenth day after the exchange of ratifications, and continuing so long as the treaty should be in effect, which the terms of the treaty fixed at five years from the time of its taking effect.

Necessarily and designedly Congress did not attempt or intend to change or modify the terms of the treaty; because if the terms had been changed Cuba would have been free to reject the treaty. The act is entitled: "An Act to carry into effect, etc." How could it carry the convention into effect if it varies its terms?

There can be no question here but that a past time was deliberately fixed. There is no ambiquity in the language used, so that there is no room for construction. It was said in United States vs. Trans-Missouri Freight Association, 166 U. S., 290, at page 318, that "the only proper way to construe a legislative act is from the language used in the act."

It is no objection to the plain language of the statute that it has been the policy of the legislature to make tariff acts operative at a date subsequent to their passage in order to give notice of the change in rates. In St. Paul, etc., Ry Co.

vs. Phelps, 137 U. S., 528, at page 536, this Court said:

> "* * * where a statute * * * is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government. * * *"

The statute approving the convention clearly expresses the intention of the Legislature, that the convention should be in effect from the time agreed upon by the contracting parties in the convention itself, and there could be no ground for seeking the intention of the Legislature outside of the terms of the statute. Under the settled rules of construction it cannot be presumed that the Congress meant something other than it said.

II.

The President had no power to postpone the time of taking effect of the treaty.

On the day when the Act approving the treaty was passed, the President issued a proclamation reciting that he had received satisfactory evidence that the Republic of Cuba had made provision to give full effect to the articles of the convention, and declaring the convention "to be in effect on the tenth day from the date of this my proclamation."

There is no authority whatever for the President's postponement of or in any way alone determining the time of taking effect of the convention, either in his treaty-making powers, his participation in the law-making power, or in the statute approving the

convention, but on the contrary, his action was in contravention of the requirements of all three.

The President's treaty making power is only that which is given him by Article II, Section 2 of the Constitution, providing that

> "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators pesent concur."

Alone, he could no more fix the time of taking effect of a treaty than he could alter any other provision of the treaty. Every act of his in relation to a treaty must be concurred in by the Senate. Even with the concurrence of the Senate he could not alter any provision of the treaty or annex to it a provision that was never presented to the other contracting government. It had been agreed, by the terms of the treaty, that it should be in effect ten days after the exchange of ratifications, subject to the approval of the Congress. It had never been contemplated that it should only become effective at such time as the President should declare it to be in effect, for if he could postpone it ten days, he could postpone it a year, or any other period of time.

If the time of taking effect be regarded as fixed by the taking effect of the statute approving it, the President has no power in any way to postpone the taking effect of a statute, except as he shall, in the manner prescribed by the Constitution, hold it until the expiration of the time within which it may become a law without his signature. Otherwise any act must become a law, if at all, in the form, and in all respects according to its terms as passed by the Congress.

The Act approving the convention expressly fixed the time when it should be in effect. The only action required on the part of the President was his proclamation that he had received evidence that Cuba had made provision for giving effect to the convention, and it was enacted that thereupon, "*on the tenth day after exchange of ratifications*," the reduced rates provided by the convention would be in effect, and continue so long as the treaty should remain in force.

As the convention was not entered into by virtue of the provisions of Sections 3 or 4 of the Tariff Act of 1897, relating to commercial agreements, the President's powers under those sections are not material to be considered.

The action of the President is so entirely without authority or support that there could be no ground for fixing December 27th, 1903, as the date on which the treaty took effect. Upon the President's proclamation that he had received evidence that Cuba had made provision for giving effect to the convention, it immediately became applicable, by force of its terms and those of the Act of Congress, to the duties on all imports from Cuba from the tenth day after the ratifications had been exchanged.

Dated , 1906.

EDWARD S. HATCH,
J. STUART TOMPKINS,
Counsel for M. J. Dalton & Co.